

RECEIVED FEDERAL ELECTION COMMISSION SECRETARIAT

2009 YAR 12 A 10 41

SENSITIVE

William Lawler, Esq Vinson & Elkins, LLP 1455 Pennsylvania Avenue, NW, Suite 600 Washington, D C 20004

RE MUR 5504

Jayann Brantley

MAR 1 2 2008

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Dear Mr Lawler

Based on a complaint filed with the Federal Election Commission on August 3, 2004, and information supplied by your client, Jayann Brantley, the Commission, on May 11, 2007, found that there was reason to believe Jayann Brantley violated 2 U S C § 441f, and instituted an investigation of this matter

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred

The Commission may or may not approve the General Counsel's recommendation Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible). The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings," 72 Fed Reg 7551 (Feb 16, 2007) Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must

be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement

Should you have any questions, please contact Delbert K Rigsby, the attorney assigned to this matter, at (202) 694-1650

Sincerely,

Thomasenia P Duncar

General Counsel

Enclosure Brief

1 BEFORE THE FEDERAL ELEC			TION COMMISSION	
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3	In the Matter of)		
4)		
5	Jayann Brantley)	MUR 5504	
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7	GENERAL COUNSEL'S BRIEF			
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9	I. INTRODUCTION			

Complainant, a former employee, alleged that John Karoly, Jr, the President and Treasurer of Karoly Law Offices, P C ("Karoly Law Offices") caused Karoly Law Offices to reimburse four other employees and their spouses, including secretary Jayann Brantley and her husband, for \$13,000 in contributions to Gephardt for President ("Gephardt Committee") with the law firm's corporate funds Mr Karoly, representing the four law firm employees and their spouses and himself, responded by submitting identical cursory affidavits from himself and each alleged conduit, which state, in their entirety "My contribution to the Richard Gephardt campaign was not based upon any reimbursement and I received no reimbursement for same" The Federal Election Commission ("Commission") found reason to believe that Jayann Brantley violated 2 U S C § 441f by knowingly permitting her name to be used to effect a contribution in the name of another from Karoly Law Offices In response to the reason to believe finding. Brantley denied the reimbursement by stating that she received various payments from the law firm including salary, bonuses for overtime and reimbursements. She also submitted documents in response to a Commission subpoena. Upon receiving a deposition subpoens, however, Ms Brantley asserted her Fifth Amendment privilege and declined to appear for a deposition Our investigation shows that Brantley was reimbursed \$4,000 for her and her

husband's contributions to the Gephardt Committee Based on the information discussed below,

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- this Office is prepared to recommend that the Commission find probable cause to believe that
- 2 Javann Brantley violated 2 U S C § 441f

II. SUMMARY OF THE RECORD

4 On September 28, 2003, the same day that other Karoly Law Offices employees and their

spouses made contributions to the Gephardt Committee, Brantley wrote a check for \$4,000 to the

Gephardt Committee, representing contributions from herself and her husband, Theodore

7 Brantley, of \$2,000 each 1 This is the only contribution that the Brantleys have ever made to a

federal candidate On October 7, 2003, Karoly Law Offices cashed a check for \$12,000 That

same day, the Brantley's deposited \$4,000 in cash to their credit union account

In an affidavit dated August 17, 2004, Ms Brantley denied that she had been reimbursed for her contribution to the Gephardt Committee. This affidavit, submitted when she was still represented by Karoly, was the same one submitted by all of Karoly's then clients. Gregory Paghanite, who was employed as a paralegal by Karoly Law Offices in 2003 but has since left that firm, disavowed the affidavit dated August 17, 2004 submitted in response to the complaint and has admitted in a more recent affidavit that he was solicited by Karoly to contribute to the Gephardt Committee, with the promise of reimbursement. See Paghanite affidavit dated June 27, 2006 at p. 1. Paghanite wrote a check for \$4,000 dated September 28, 2003 to the Gephardt Committee, the only federal contribution ever made by Paghanite or his spouse. Subsequently, Karoly requested Jayann Brantley, who handled financial matters at the firm, to bring him cash

Brantley's net pay in 2003 from Karoly Law Offices was \$32,975, and at the time Brantley wrote the \$4,000, she had inadequate funds in her account to cover it

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MUR 5504 General Counsel's Brief Jayann Brantley

1 Id After Brantley brought cash to Karoly, Karoly reimbursed Paglianite for his and his wife's

2 contributions of \$4,000 to the Gephardt Committee Paglianite deposited the \$4,000 in cash into

his personal bank account on October 7, 2003 Id²

In response to the Commission's reason to believe findings, Brantley stated through new counsel that she received various payments from Karoly Law Offices including regular salary, sporadic bonuses for overtime and periodic reimbursements for administrative and office expenses, and it was her decision to contribute to the Gephardt Committee. The law firm's payroll records do not reflect the \$4,000 deposited into the Brantleys' account on October 7, 2003 as regular pay, overtime pay or as a bonus to Jayann Brantley. There is also no evidence that these funds represent reimbursement of administrative and office expenses.

On October 26, 2006, we sent Brantley a deposition subpoena to appear for testimony, her appearance was postponed by mutual agreement. Subsequently, she declined to appear and asserted her Fifth Amendment privilege against self-incrimination. See letter from Brantley's counsel to the Commission dated June 7, 2007. Karoly, as well as a current and former law firm employee who contributed to Gephardt's campaign and deposited commensurate funds into their accounts on October 7, 2003 and October 27, 2003, also asserted their Fifth Amendment privileges and declined to appear for a deposition pursuant to Commission subpoenas.

On October 7, 2003, the same day the Karoly Law Offices cashed a \$12,000 check, Gregory Paglianite deposited his \$4,000 cash reimbursement into his bank account and the Brantleys deposited \$4,000 in cash into their credit union account, another law firm employee who had contributed to the Gephardt Committee had a \$3,000 Karoly Law Offices' check not recorded in the firm's payroll records, deposited into her bank account. Another law firm employee who contributed to Gephardt's campaign made a large cash deposit into her bank account on October 27, 2003.

Ш **ANALYSIS**

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No person shall make a contribution in the name of another person or knowingly permit his or her name to be used to effect such a contribution 2 U S C § 441f. The evidence shows that Jayann Brantley allowed her name to be used to effect a contribution in the name of another by being reimbursed for contributions to the Gephardt Committee in violation of 2 U S C § 441f In this matter, the evidence is sufficient to support a probable cause finding that Jayann Brantley violated 2 U S C § 441f Shortly after making their first ever contributions to a federal candidate, the Brantleys deposited \$4,000 in cash from Karoly Law Offices that cannot be traced to the law firm's payroll records to pay, overtime pay or bonuses. This evidence is corroborated by Paglianite's disavowal of his initial affidavit, identical to Brantley's, and his admission in a more recent sworn affidavit that he was reimbursed for federal contributions by Karoly Law Offices at Karoly's behest The evidence also includes Paglianite depositing \$4,000 in cash into his bank account on October 7, 2003, the same day that the law firm cashed a \$12,000 check, and by other Karoly Law Offices' employees that contributed to the Gephardt Committee depositing commensurate funds into their bank accounts on October 7 and 27, 2003 ³

Written representations by counsel for Brantley that her deposits did not represent reimbursement and her affidavit should be regarded in the context of her decision not to testify. She was aware that this Office had obtained information that contradicted, or at least called into serious question, those submissions, and therefore sought to depose her in order to elicit sworn testimony that was subject to cross-examination, follow-up, and clarification Because she chose to invoke the Fifth Amendment or otherwise declined to appear, that opportunity was lost. For these types of reasons, federal courts have upheld a district court's power to strike or disregard testimony, live or in the form of an affidavit, from witnesses who assert the Fifth Amendment and refuse to answer the government's deposition testimony in order to shield their testimony from scrutiny See e.g. U.S. v. Parcels of Land, 903 F. 2d 36 (1" Ctr 1990), Lawson v Murray, 837 F 2d 653, 656 (4" Ctr) cert dented, 488 U S 831 (1988) (To allow a witness to testify and then assert the Fifth Amendment to escape scrutiny would be "a positive invitation to mutilate the truth ") Although this Office is not suggesting following such precedent to strike her affidavit or written submissions in this matter, the Commission should give little or no weight to them

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The Commission is entitled to draw an adverse inference from Brantley's refusal to testify at a subpoened deposition. The adverse inference rule provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him " International Union (UAW) v NLRB. 459 F 2d 1329, 1336 (D C Cut 1972), see also, Arvin-Edison Water Storage Dist v Hodel, 610 F Supp 1206, 1218 n 41 (D D C 1985) The theory underlying this rule is that, all things being equal. "a party will of his own volution introduce the strongest evidence available to prove his case" International Union (UAW), 459 F 2d at 1338 Conversely, if the party fails to introduce such evidence, it may be inferred that the evidence was withheld because it contravened the position of the party suppressing it *ld* Thus, when a party unreasonably resists a subpoena for relevant testimony or documents, it can be inferred that the refusal to comply with the subpoena indicates that the evidence or testimony would be adverse to the party's position See id at 1338-39 Moreover, an administrative agency need not seek enforcement of the subpoena in court before drawing an adverse inference from the resisting party's failure to comply with it Id Invoking the Fifth Amendment does not preclude drawing an adverse inference against a party in a civil action that refuses to testify in response to probative evidence offered against him Baxter v Palmigiano, 425 U S 308, 318 (1976), see also, SEC v International Loan Network, Inc., 770 F Supp 678, 695-96 (D.D.C. 1991), aff'd, 968 F 2d 1304 (D.C. Cir. 1992) (court may draw adverse inference from party's refusal to testify based on Fifth Amendment), Pagel, Inc. v. SEC, 803 F 2d 942, 946-47 (8th Cir 1986) (agency did not err in taking into account adverse inference based on broker-dealer's invocation of Fifth Amendment privilege against self-

MUR 5504 General Counsel's Brief
Javann Brantley

	Jayanni Dranney		
1	incrimination), Cerrone v Shalala, 3 F Supp 2d 1174, 1175 n 3, 1180 (D Colo 1998)		
2	(agency's finding, based in part on adverse inference drawn against disability benefit recipient		
3	who invoked Fifth Amendment, was supported by substantial evidence)		
4	Based on all the reasons stated, the Office of General Counsel is prepared to recommend		
5	that the Commission find probable cause to believe Jayann Brantley violated 2 U S C § 441f		
6	IV. GENERAL COUNSEL'S RECOMMENDATION		
7	1 Find probable cause to believe that Jayann Brantley violated 2 U S C § 441f		
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10	3/11/2008 (Momercus 1. 1/m		
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12	General Counsel		
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16	Mark D Shonkwiler		
17	Acting Deputy Associate General Counsel		
18	For Enforcement		
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22	Susan L Lebeaux		
23	Assistant General Counsel		
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Attorney